

International Longshoremen's and Warehousemen's Union, Local 6 (Industrial Employers and Distributors Association) and James E. Johnson.
Case 20-CB-9065

August 28, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The issue presented here is whether the judge correctly found that the Respondent's failure to reinstate the Charging Party's union membership and black book status did not violate Section 8(b)(1)(A) and (2) of the Act.¹ The Board has considered the decision and the record in light of the exceptions and brief² and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ On May 5, 1995, Administrative Law Judge James S. Jenson issued the attached decision. The Charging Party filed exceptions and a supporting statement. The Respondent filed an answering statement and motion to strike the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² We deny the Respondent's motion to strike the exceptions.

³ The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Charging Party also asserts in exceptions that the judge's decision evidences bias and prejudice. On our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or exhibited bias against the Charging Party in his analysis and discussion of the evidence.

Leticia Pena, Esq., for the General Counsel.
Ann Casper, Esq. (Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar), of Oakland, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. This matter was heard in San Francisco, California, on April 28, June 7, and July 18, 1994.¹ The amended complaint alleges the Respondent has refused to reinstate Johnson's union membership and black book status and seniority and refused to refer

¹ The charge was filed August 5 and amended on November 6, 1992. The complaint issued July 30, 1993, and was amended on August 1, 1993.

him to jobs because he had engaged in intraunion political activities, thereby violating Section 8(b)(1)(A) and (2) of the Act. The Respondent denies it has committed any unlawful acts and claims Johnson voluntarily withdrew from membership in 1984 when he enlisted in the Army, and lost his right to have it reinstated by failing to return within 2 years.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel and Respondent and have been carefully considered.

On the entire record in the case, including the briefs, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. LABOR ORGANIZATION AND JURISDICTION

The Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act. It also admits that it negotiates and administers collective-bargaining agreements with an association of employers whose employer-members meet the Board's applicable discretionary jurisdictional standards and are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Accordingly, it will effectuate the policies of the Act for the Board to assert jurisdiction.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Setting

James E. Johnson, often referred to as Ellis through the hearing, became a black book member of Respondent on October 15, 1976, following a qualifying year of work at a Heublein plant in Menlo Park, California, located approximately 30 miles south of San Francisco. The Heublein plant is within the Respondent's West Bay division. At the beginning of Johnson's employment at Heublein, Al Lannon was the Union's business agent for the West Bay Division. Having been recommended by a union member, Lannon appointed Johnson as a shop steward. He was later elected chief steward, which apparently coincided with the commencement of a rocky relationship between he and Lannon, resulting in charges and counter charges and with Lannon being reassigned to another of Respondent's divisions, whether by his choice or as a result of a petition for his removal is not clear and is of no moment. Lannon, who teaches labor studies at two local colleges and at San Francisco State University, testified that while he didn't know at the time whether Johnson was a member of the "rank-and-file-caucus" also called the "coalition caucus," he found it out later, but that the local was a "democratic union," a "haven for people with unpopular ideas for many years," among which were the Communist Party, the Separatist League, the October League, the Revolutionary Union, and several others whose names he couldn't recall and that they were all functioning at that time. The record shows that James W. Ryder was one of the founders of the coalition caucus in the late 1970's, and that he was the local union president from January 1989 through May 31, 1992, at which time he resigned and Joe Jasen became president. Ryder testified that when he

resigned as president, there were other coalition members that were union officers.²

The record shows that Johnson was terminated at Heublein on April 14, 1983. He enlisted in the Army the following year, having secured a letter of recommendation from then-Local Secretary/Treasurer Leon Harris. While stationed in Germany, he reenlisted for another 4 years, thus serving 8 years in the Army prior to his disability discharge on May 15, 1992. While Johnson testified he never intended to make the military a career, he testified that he could have stayed in after 8 years but chose not to because it would have meant assignment to another type unit. Upon release from the Army, he sought reinstatement of his status as a black book member of Respondent.

B. Johnson Enters the Military

Johnson testified that in March 1984 he spoke with Business Agent Joe Figuero, now deceased, regarding his entry into the Army and the fact he wanted to protect his membership in the Union. According to him, Figuero told him about TRC³ status and, after first calling her, sent him to see Carmelita De La Cruz (Carmelita) the senior cashier in the dues department. He testified he told Carmelita that he was going into the military and wanted to protect his membership while he was in the service and that she told him that he would go into inactive status with his membership frozen in place, that he wouldn't have to pay any dues and the only thing required for him to do was to return to the Union within 2 weeks of his discharge with documentation of his timely return and his membership would be reinstated.⁴ He claimed she gave him a two-page document outlining the procedure.⁵ He testified that on April 1, 1984, after receiving notice of his Army reporting date, he contacted Carmelita, told her he wanted to go to inactive status and that she pulled a "folder file," and typed something in it and in his black book, returned the book and said that the only thing he had to do was report back within 2 weeks of his Army discharge.⁶ His entry into the Army was delayed 2 weeks after he was subpoenaed by the Union to testify at an arbitration hearing and his black book was "reactivated" until April 30 so that he could work in the interim. Following basic and advanced infantry training, Johnson was granted leave and visited the union hall at which time he spoke with Harris regarding the Army and the fact that Harris' brother was also in the Army. He claimed that as he was leaving, Harris told him, in a hostile voice, not ever to come back. In an obvious effort to portray Harris as hostile toward him, Johnson testified that in 1982, in a bar, Harris alluded to the fact that several people, presumably coalition members, had been murdered and that Johnson was the only coalition lieutenant left. Neither of these alleged conversations was corroborated and were specifically denied by Harris. Harris exhibited no hostility to-

ward Johnson during the hearing, and as noted, had written a letter of recommendation when Johnson entered the Army. The only hostility apparent during the hearing of this matter was by Johnson. Harris' denial of the alleged statements is credited.

Johnson claimed that on September 9, 1986, while on military leave, he stopped by the union hall to check on his membership status and to obtain a duplicate copy of his black book at which time Carmelita "pulled my file" and said he was still in an inactive status and there was nothing to worry about as long as he returned within 2 weeks of his discharge from the Army. He claimed that Carmelita issued him a duplicate black book, the last of four in evidence, in which she typed "Dup. Book Issued 9/9/86—in TRC."⁷ He represented at the hearing that the black book for which he sought replacement and which he retained when he entered the Army, was worn out, and while he had kept it along with the two-page document outlining reinstatement rights which Carmelita had given him, and which he reviewed a number of times, both had been lost or misplaced. He testified that after talking to Carmelita, he talked to retired Secretary-Treasurer Keith Eickman and to Leon Harris who was the current secretary/treasurer, and that Eickman said that whenever he got out of the military his membership would be there, and that Harris nodded agreement.⁸

Johnson reenlisted in the Army in 1988 with a scheduled separation date in August 1992. In March of that year, however, he learned he would be discharged early for medical reasons. As previously noted, he could have remained in the Army in another unit but chose instead to get out. He was discharged on May 15, 1992.

C. Johnson Applies for Reinstatement

Johnson testified that on April 3 he placed a long-distance telephone call to Carmelita, informing her he was getting out of the Army and wanted to clear the way to reinstate his membership; that she said he wasn't in the computer system

⁷The four black books in evidence and the pertinent entries in each are:

General Counsel's Exhibit No. 22
Duplicate Book Issued 10/26/78
Dues paid thru October 1978

General Counsel Exhibit No. 26
Dup. Book Issued 12/14/79
Paid thru October 1979

Respondent Exhibit No. 1—(Covers dues paid 3/25/83 to 7/27/83)

General Counsel's Exhibit No. 4
Dup. Book Issued 9/9/86 in TRC.

²Ryder resigned after Johnson was back from the Army. Also, Victor Pamirov, a coalition founder, was a business agent at the time.

³Which is a temporary retirement card.

⁴Carmelita denied making these representations.

⁵Also denied by Carmelita, and as the record shows, neither the prison nor military leave policies were in writing and the policy covering the military was changed on several occasions.

⁶The record shows that Respondent did not utilize "folder files" until several years later. This conservation also denied by Carmelita.

The record shows that Respondent did not maintain file folders on members until after it converted from NCR dues cards to computer, the conversion commencing in November 1986 and was completed at the end of 1987. Prior, the only record kept on members was the NCR dues card. After the conversion, a file folder was made for each active and inactive member (those in prison and on long-term disability). Carmelita denied she issued duplicate books to anyone other than active dues paying members and in which she always noted dues payments which had to be current.

⁸Both Eickman and Harris deny this conversation occurred.

and that she would have to find old records and to call her back; that he called back a few hours later and she told him she had found the records, that she didn't see any problem in reinstating his membership but that she had to "touch bases" with the secretary/treasurer and to call back in a few days;⁹ that he called again on April 7 and was informed by Carmelita that she had checked with Secretary/Treasurer Moreno who said he had lost his membership and had to start over but that she would talk to Moreno again and to call back; that Carmelita told him in the second call that he was entitled to his membership back and transferred him to Ryder who confirmed he had a right to receive his black book back.¹⁰ Johnson reported to the union office on May 25 (Carmelita was not there), 26, and 27, and failing to receive a definitive answer, and feeling he was getting a run-around, attended the General Executive Board meeting that night. He claimed he talked to both Harris and Eickman that evening who assured him there was no problem¹¹ and that Moreno told him that he was still looking into it and to stop by the office the next day. The following day, he testified, he talked to Moreno who claimed that Johnson had taken a withdrawal from the Union and hadn't returned within 2 years and therefore lost the right to reinstatement, Johnson claiming instead that he didn't withdraw but went on inactive status. Johnson stated he wasn't interested in running for union office but only wanted his black book back, and that Eickman and Harris had promised that he was entitled to his membership back. Moreno stated he would contact both Eickman and Harris and if Johnson had anything in writing to prove his position, that he should bring it in. Johnson was then given permission to use the phone, which he did to call the office of a member of Congress to report the problem he was having with getting his membership reinstated. At Johnson's request, Moreno signed a paper signifying Johnson had reported to the union office within 30 days of his leaving the military.

Sometime in June, Johnson attended and was allowed to speak at a West Bay membership meeting, which voted to go on record as reinstating his membership. Business Agent Fred Pecker voiced his objection on the ground it was a matter for the General Executive Board.¹² The following day Johnson informed Moreno of the vote, but was informed he wasn't getting his membership back. On June 19, Johnson talked to Harris in the latter's office and asked if Harris recalled the time when he and Eickman had said his membership would be there when he returned from the military. According to Johnson, Harris responded that he didn't recall such a conversation and that returning military had always been handled pursuant to the collective-bargaining agreement

between the Union and employers which followed the Selective Service Act of 1948, and that membership reinstatement rights were lost when an individual reinlisted.¹³ Johnson attended the General Executive Board meeting on June 24, addressed the membership and Board regarding his restoration of membership, requested a vote and was informed one would be in violation of the Union's constitution since he was not a member. Moreno stated that Johnson had withdrawn and had failed to return within 2 years so he lost his membership. Another member of the General Executive Board stated that Johnson had become a professional soldier at which time he lost his membership. Johnson testified, contrary to Jasen whom I credit, that after the meeting Jasen said he needed to go to the District Council to resolve the matter, and that, "The only way that you're going to get your membership back is if a Judge rules that you get your membership back."

The charge initiating this matter was filed on August 5.

Johnson attended the October General Executive Board meeting and raised the issue of his black book, but was ruled out of order and informed that because the matter was now before the NLRB, the Union's attorney had advised them not to discuss it.

D. Respondent's Policies on Withdrawals, Prison Leave, and Military Leave

1. Withdrawals

Withdrawals are covered by the Union's constitution and bylaws. From 1946 until 1975, a member on withdrawal for less than 2 years could be reinstated upon payment of all back and special dues.¹⁴ From 1975 when they were amended until January 1984 when they were again amended, the bylaws provided that members on withdrawal could be reinstated upon approval of the membership if the request was made within 1 year and all back and special dues were paid, or if the request was made after 1 year upon approval of the membership and payment of current and special dues.¹⁵ The requirements for reinstatement were amended in January 1984 to eliminate the requirement that the request for reinstatement be approved by a vote of the membership and to further limit the time for return to 1 year. In 1987 the bylaws were again changed to extend the time for reinstatement from 1 to 2 years upon payment of back and special dues. While he denied having ever completed one, the General Counsel's Exhibit 17 is a withdrawal application which Johnson testified was used when he was chief steward at Heublein and when he was on the General Executive Board. One of its provisions is that the withdrawal card will not be granted until the union (black) book is surrendered to the union office. Dues procedures in effect April 1, 1992, Respondent Exhibit 3, provide that a withdrawal is good for only 2 years after which "there will be no reinstatement." The record also shows that all withdrawals and reinstatements have to be approved by the secretary/treasurer.

⁹ Johnson's telephone bill reveals two calls made to the Respondent's number on April 3, of 1 and 2 minutes duration, respectively. Carmelita denied talking to Johnson on that date, claiming she was on vacation. Attendance records for Respondent also list her on vacation on that date.

¹⁰ Ryder testified that while no one returning from the military had applied for reinstatement during his term as president of the local from January 1989 through May 1992 when he resigned, it was his understanding that returning military were entitled to reinstatement but that "the secretary/treasurer normally handled those issues."

¹¹ Denied by both Harris and Eickman.

¹² The General Executive Board is the highest policymaking body of the local.

¹³ This is consistent with Harris' recollection and with the military policy.

¹⁴ R. Exh. 5.

¹⁵ G.C. Exh. 9.

2. Prison leave policy

The parties stipulated that the Respondent has an unwritten policy in which members who go to prison can be placed in Temporary Retirement Card status (TRC) and if they return to the Union within a reasonable time following their release and make the request, their black book will be returned. Harris testified the Union felt it had a social responsibility to help its imprisoned members return back to society. The approval of the secretary/treasurer or the president was required for one to be placed into, or taken off, TRC status. Harris was secretary/treasurer from 1981 to September 1991. He testified he checked the TRC list every month during his term of office to be sure no names had been added without his knowledge. Johnson's name was never on the list.

3. Military leave policy

Contrary to Johnson's testimony that Carmelita had given him a two-page document outlining military leave policy, all witnesses, including those of the General Counsel other than Johnson, testified the policy was either unwritten or that they had never seen a written policy. The record shows the policy changed over the years following World War II and the implementation of the Selective Service Act which provided that inductees had the right to return to jobs in the private sector under certain circumstances. The Act was later amended to provide for the reemployment rights of inductees and enlistees who served no more than 4, and in some cases 5, years on active duty in the military. The Respondent's master collective-bargaining agreement follows the Selective Service Act insofar as reemployment rights are concerned. Harris, whom I credit, testified that whether an individual was drafted or volunteered, he or she had 90 days within which to return to the Union for reinstatement so long as the individual had not reenlisted. One who reenlisted was deemed to have chosen the military as a career and lost the right to reinstatement. While a number of former officers or officials of the Respondent testified to a variety of understandings with respect to the military leave policy, none had been confronted with its application with the exception of Harris who was the secretary/treasurer from 1981 through September 1991. He testified that people seeking reinstatement after serving in the military "eight, nine, ten, twelve years, or some as high as fifteen years" were denied reinstatement by him on the basis that they had abandoned warehousing as a profession and made the military a career.

E. Respondent's Defense

The record shows that Moreno had been secretary/treasurer less than a year and had never experienced a request to be reinstated following military service at the time Johnson contacted him. He testified that upon learning from Carmelita that Johnson had returned from the military and was seeking reinstatement of his black book, he asked her Johnson's status and was told that he had withdrawn in good standing. He asked her to bring him any documentation on Johnson, and 2 days later was told that all information the Union had on him had been destroyed when they converted from NCR cards to the computer. Moreno also asked the office manager to bring him any information regarding military and prison leave and was informed there was no written policy. After Johnson met with him in his office and represented that both

Eickman and Harris had promised him that he was entitled to reinstatement, Moreno contacted those men who both denied Johnson's representation. Harris testified he told Moreno that he understood Johnson had withdrawn, that he had written a letter of recommendation at the time Johnson went into the Army, and that he understood Johnson was making the Army a career. Eickman testified that prior to 1992, Johnson had come to his office and that he was surprised Johnson said he enjoyed the Army and was going to make it a life career. Lannon testified that when Johnson enlisted in the Army he "made it real clear that he was done with Local 6 . . . and we were history as far as he was concerned. He was gone. He wanted nothing to do with this union any more. He's taken a withdrawal and was on his way to a new career." He testified Johnson never talked to him about protecting or preserving his union membership. Carmelita testified that he had taken a withdrawal "and that he is making the service his career, and he was very happy . . . that day that he was leaving he doesn't have . . . any more to pay dues." She also denied discussing with him, or giving him, any printed material regarding a military leave policy "because we don't have anything like that." The record further makes it clear that the secretary/treasurer, as the keeper of the Union's records, is the individual with the authority to approve withdrawals, reinstatements, or the placement of anyone in TRC. The record affirmatively establishes that Carmelita lacks any independent authority in those respects and is not an agent of Respondent as defined in Section 2(13) of the Act.

Conclusions

The complaint allegations that the Respondent unlawfully refused to reinstate Johnson to black book membership status, register him for referral, refer him and restore his accrued black book seniority because of his engagement in intraunion political activities are totally without merit. The overwhelming evidence establishes that Johnson withdrew from the Union in 1984 at the time he entered the military and that he intended making the military his career as evidenced by his statements at the time and by his reenlistment. But even if he hadn't taken withdrawal in 1984, he still was not entitled to reinstatement of his black book status by reason of his reenlistment which was uniformly treated by the union an abandonment of warehousing as a profession and a switch to a military career. I place no credence in Johnson's claim that Carmelita gave him a two-page document setting forth the reinstatement policies covering those in the military and prison which provided they both be placed in TRC status. All the witnesses who were asked the question, including Ryder who testified for the General Counsel, testified that neither policy was in writing. That, I believe, accounts for the fact that Johnson could not produce it. I am also convinced his failure to produce the black book, which he had prior to entering the military, was due to the fact he was required to relinquish it when he took a withdrawal in 1984 as required on the face of the withdrawal form. Johnson maintained the Union kept file folder records on members. The credible evidence shows that prior to switching from NCR to computers, the only record the Respondent had for each member was a dues card. Dues cards for current members and those on long-term disability were placed in file folders following the change over to computer. The non-

active members dues cards were kept until their reinstatement rights expired by time and were then destroyed. Johnson claimed he talked to Carmelita on April 3. Her testimony and attendance records show she was on vacation that day. He attributes statements to Carmelita, Harris, Eickman, Moreno, and Jasen which were denied. Despite the black book, the General Counsel's Exhibit 4, which contains the notation "Dup. Book Issued 9/9/86 in TRC," the evidence fails to show that Johnson was in TRC. Carmelita, whom I found to be more credible than Johnson, denied she had issued it because she only issued duplicate books to active members and she would have pulled his control card so that she could record the last date a dues payment was made. Further, duplicate black books are not issued to anyone in TRC and she had never written "in TRC" in a duplicate book. The origin of the entry in the General Counsel's Exhibit 4 remains a mystery to me, but nevertheless does not convince me Johnson was entitled to TRC status. In this regard, Harris was the secretary/treasurer from 1981 to September 1991, testified he had not placed Johnson in TRC, and furthermore that he had checked the list of those in TRC on a monthly basis and Johnson's name was never on it. Also, the record fails to establish by credible evidence that any action taken by Respondent was attributable to Johnson's intraunion political activities. His attempt to portray Harris, the man that had written him a letter of recommendation to

get into the Army and with whom he visited when he was on military leave, as hostile toward him, falls totally flat. Likewise, the claim that his intraunion political activities more than 8 years ago had anything to do with his failure to regain his black book status is equally lacking in merit. Victor Pamiroy, along with Ryder were founders of the "coalition." Pamiroy was business agent and Ryder the president when Johnson returned, and Ryder testified when he resigned as president on May 31, 1992, that there were other "coalition" members left as officers. In sum, the General Counsel has failed to prove by a preponderance of the evidence the unfair labor practice allegations contained in the complaint. Accordingly, I recommend the amended complaint be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The amended complaint is dismissed in its entirety.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes